No. 78-915

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN BROUSSARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 582 F. 2d 10.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. A petition for rehearing was denied on November 8, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on December 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's prosecution in the Western District of Texas was barred by a prior plea agreement in the Northern District of Texas.

2. Whether the district court adequately advised petitioner at the time he pleaded guilty of the maximum special parole term that could be imposed.

STATEMENT

An indictment filed in the United States District Court for the Western District of Texas on November 14, 1977, charged petitioner and three co-defendants with conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963, and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. On March 2, 1978, pursuant to a plea agreement, petitioner pleaded guilty to conspiracy to import marijuana. He was sentenced to five years' imprisonment and 20 years' special parole. The court of appeals affirmed (Pet. App. A).

In December 1976, petitioner had been indicted in the Northern District of Texas on charges of conspiring to import marijuana, amphetamines, and cocaine from Mexico into the United States. He entered into a plea agreement whereby the government agreed to dismiss that indictment in return for petitioner's plea of guilty to an information charging him with misprision of a felony and constructive possession of marijuana. Petitioner then pleaded guilty to the information on April 4, 1977, stating to the court that the only promise made by the government in return for his guilty plea was the dismissal of the indictment (Pet. App. A-4). The trial judge approved the plea agreement and, on April 29, 1977, sentenced petitioner to four months' imprisonment on one charge and probation on the other.

Petitioner moved to dismiss the present indictment on the ground that, as part of the earlier plea agreement in the Northern District of Texas, the government had agreed not to prosecute him on any other federal drug

offenses committed prior to the date of the plea.[1] A United States Magistrate held an evidentiary hearing on the motion on January 6, 1978, at which petitioner's attorney and Jay Ethington, Assistant United States Attorney for the Northern District of Texas, testified about the terms of the plea agreement entered in that District. The evidence showed that while awaiting preparation of the superseding information to which petitioner had agreed to plead guilty, petitioner's counsel told Ethington that petitioner would not enter the plea unless it was agreed that the guilty plea would "clean his slate * * * as far as any marijuana related * * * offenses" (H. 62-63).[2] Ethington agreed that if petitioner were to plead guilty, he would not "turn around and indict [petitioner] the next day" (H. 7)—that is, that petitioner would not be further indicted in the Northern District of Texas (H. 8). Although petitioner's counsel was aware of an investigation of other offenses committed by petitioner pending in the Western District of Texas, he did not mention it to Ethington or otherwise seek to include those offenses in the plea agreement (H. 9, 63-65). Ethington had no knowledge of that investigation and did not agree that petitioner would not be subject to future prosecutions in other districts (H. 7-10).

Based on the foregoing testimony, and on petitioner's statement in the Northern District of Texas that no promises other than dismissal of the indictment in that district had been made,[3] the magistrate found that the

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[1]The present indictment alleges acts committed prior to April 4, 1977, the date petitioner entered his plea in the Northern District.

[2]"H." refers to the transcript of the January 6, 1978, hearing on petitioner's motion to dismiss. "M." refers to the seven-page Findings of Fact by the United States Magistrate. "Tr." refers to the transcript of the March 2, 1978, Rule 11 proceeding.

[3]When he pleaded guilty in the Northern District of Texas, petitioner was asked, "Has anyone made any promises to you other than the dismissal of the indictment that you have been charged with heretofore?" Petitioner answered, "That's all" (M. 2).

government had agreed only to dismiss the indictment then pending in the Northern District (M. 4). On February 27, 1978, the district court adopted the magistrate's findings and denied petitioner's motion to dismiss the indictment. On March 2, 1978, pursuant to a plea agreement, petitioner pleaded guilty to the count in the indictment charging a conspiracy to import marijuana.[4]

In taking petitioner's guilty plea in the present case, the district court noted that the earlier plea agreement in the Northern District of Texas showed that defense counsel and the Assistant United States Attorney "had diametrically opposite views of what was said and what was done" (Tr. 18). The court stated that, had it found that the terms of the earlier plea agreement precluded further prosecution of petitioner in any district, it would have enforced that agreement against the government here (Tr. 22):

> If I had found on the basis of the record or if the Magistrate had found and I had concluded that there was an agreement and it just rested on whether or not the United States Attorney in the Northern District of Texas had the authority to bind every other United States Attorney in the country, I wouldn't have had any problem. I would have said "yes," because the cases hold that when one government official acts on behalf of the United States Government and he makes it broad enough to include everybody else, then they are all representing the same client, which is the government, and therefore, it would be binding upon everybody else.

But reviewing the testimony on petitioner's motion to dismiss the present indictment and the record of the prior guilty plea in the Northern District, the court found that the agreement was to dismiss only the indictment pending at the time of the plea in the Northern District (Tr. 18-19).

[4]A second indictment pending against petitioner in the Western District of Texas was dismissed as part of the plea agreement in this case.

During the course of the Rule 11 proceeding, the prosecutor informed petitioner of the potential penalties that he faced and stated that two years' special parole was the minimum that could be imposed (Tr. 5-6). Additionally, the court advised petitioner as follows (Tr. 27):

> I believe you have also been advised that the maximum penalty that could be imposed is a five year term of imprisonment, plus a $15,000 fine, plus a two year Special Parole term in the event any prison sentence is imposed; the two year Special Parole term, however, could last for as long as your life.

Finally, the written plea agreement, containing the following language, was read in court (Tr. 7):

> I understand that the maximum punishment for these offenses [is] five years imprisonment, a $15,000 fine, and a special parole term of two years. I have had the special parole procedure explained to me, and I understand that I can be subject to a special parole to and including my natural life.

ARGUMENT

1. Petitioner contends (Pet. 5-8) that the prior plea agreement in the Northern District of Texas barred the instant prosecution in the Western District of Texas. But the magistrate, the district court, and the court of appeals each concluded that the terms of the prior plea agreement did not prohibit the instant prosecution, and the correctness of this concurrent finding of fact does not warrant further review. See, *e.g.*, *Berenyi* v. *Immigration*

Director, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[5]

In any event, the record does not support petitioner's contention, which rests upon an erroneous interpretation of the rulings below. Petitioner states (Pet. 6) that the district court concluded that the prior plea agreement did not bar the instant prosecution "simply because there was no *specific* mention of the 'Western District of Texas', and the U.S. Attorney did not consult with anyone from the office of the U.S. Attorney in the Western District nor with anyone from the U.S. Department of Justice." While those facts were included in the magistrate's findings (see M. 4), which the district court adopted, the court's conclusions did not rest on them alone. The court also found that it was the dismissal of the indictment in the Northern District of Texas that the plea agreement contemplated, that the prosecutor in the Northern District was unaware of the investigation pending in the Western District, and that he intended to bind only the Northern District as to subsequent prosecution of petitioner (M. 3-4).[6] Based on those findings, as well as the findings cited by petitioner, the court concluded that "the plea bargain agreement in the Northern District of Texas did not contain any agreement as to subsequent prosecutions in the Western District of Texas" (M. 4).[7] As the court of

[5]There is thus no need to consider the question (Pet. 7-8) whether petitioner's guilty plea bars this appeal. The court of appeals affirmed the conviction on the merits (Pet. App. A-3 to A-4).

[6]None of the overt acts alleged or co-conspirators named in the instant indictment was the same as those in the indictment dismissed in the Northern District.

[7]Petitioner also contends (Pet. 8-10) that the district court's conclusions are inconsistent with the findings of fact. He bases this assertion on the magistrate's findings (1) that "the testimony of the plea bargain agreement was that the government would not prosecute for any marijuana or amphetamine violations occurring prior to the date of [petitioner's] entering the [prior] plea of guilty * * *" (M.3)

appeals correctly held (Pet. App. A-3), "the record amply supports [the district court's] conclusion that the prior plea agreement was limited to dismissal of the indictment * * * then pending in the Northern District of Texas." Cf. *United States* v. *Pihakis*, 545 F. 2d 973 (5th Cir.), cert. denied, 434 U.S. 818 (1977); *United States* v. *Alessi*, 544 F. 2d 1139 (2d Cir.), cert. denied, 429 U.S. 960 (1976).[8]

2. Petitioner also contends (Pet. 10-11) that the district court erroneously advised him that the maximum term of special parole that could be imposed was two years. Although the court did state at one point that the maximum penalty included a "two year Special Parole term," it immediately added that "the two year Special Parole term, however, could last for as long as your life" (Tr. 27). While the court's statements are somewhat inconsistent, petitioner also was told by the prosecutor

and (2) that petitioner and his counsel subjectively intended that the agreement would cover all of petitioner's acts up to the date of the plea (M.4). While the magistrate's findings are not a model of clarity, the first fact cited, when considered in context, refers to those offenses charged in the indictment dismissed in the Northern District. Accordingly, the factual findings are consistent with the court's conclusions. With regard to the second finding, a defendant's mistaken subjective impressions as to the consequences of his guilty plea ordinarily do not provide sufficient grounds to set aside the plea. See *Masciola* v. *United States*, 469 F. 2d 1057, 1059 (3d Cir. 1972); *United States ex rel. Curtis* v. *Zelker*, 466 F. 2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973). Such unexpressed impressions are not part of the plea agreement; if petitioner misunderstood the terms of the Northern District plea bargain, his remedy is to seek relief in that court, not to bootstrap his interpretation of that agreement into a bar of the present indictment.

[8]Petitioner's reliance (Pet. 6-7) on *United States* v. *Carter*, 454 F. 2d 426 (4th Cir. 1972), is misplaced. In that case, the defendant moved to dismiss the indictment, alleging that it violated a prior plea agreement, but the district court denied the motion without a hearing to determine whether the agreement in fact existed. The court of appeals remanded for a hearing. Here, by contrast, the district court held a full hearing and resolved the issue on factual grounds.

that two years was the *minimum* special parole term that could be imposed (Tr. 5-6), and the written plea agreement, which was read aloud during the Rule 11 proceeding, stated unequivocally that petitioner "under[stood] that [he could] be subject to a special parole to and including [his] natural life" (Tr. 7). As the court of appeals observed (Pet. App. A-4), "the record plainly indicates both the judge's explanation and [petitioner's] express understanding of the consequences of his guilty plea with regard to parole."[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Citing its earlier decision in *United States* v. *Adams*, 566 F. 2d 962,969 (5th Cir. 1978), the court of appeals also noted that "Rule 11 no longer requires such an explanation of the special parole term" (Pet. App. A-4). Regardless of whether that holding is correct (see, *e.g.*, *United States* v. *Del Prete*, 567 F. 2d 928, 929 (9th Cir. 1978)), it does not affect the court of appeals' conclusion that petitioner was informed at the time he pleaded guilty that the special parole term could last as long as he lived. See Pet. App. A-4. We note in addition that petitioner does not allege that he was in fact unaware of the maximum possible special parole term when he entered his plea.

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